IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 181.

THE UNITED STATES TRUST COMPANY OF NEW YORK ET AL., APPELLANTS,

vs.

TERRITORY OF NEW MEXICO.

COUNTER STATEMENT OF CASE.

Before entering upon the case, counsel for appellee desires at the outset to invite the attention of the court to the question as to whether the appellants have brought their record into this court in such shape as to entitle them to any review whatever. This is set out under the first "Point" hereinafter contained. Appellee does not, however, shrink from the fullest possible argument of the case, and will proceed herein as though said point were not made, although all consideration of the case on this appeal is cut off if that point is well taken.

While appellants in their "Brief" have attempted to make a "Statement" of this case, yet, from the point of view of the appellee, they have included in that statement much which is irrelevant and unnecessary; have omitted some things which may be of importance, and have so stated others as possibly to produce misleading impressions.

I shall, therefore, without specifically making answer to what is stated by appellants, briefly set out what is necessary for a distinct understanding of all that is for argument on this appeal.

In July, 1895, the United States Trust Company of New York, one of the appellants herein, began a suit in the district court in New Mexico to foreclose a mortgage on the western division of the Atlantic and Pacific Railroad Company, and in January, 1896, Charles W. Smith, the other appellant, was appointed receiver in said suit, and put in possession of all of said property. On April 10, 1896, a decree was entered in said suit, directing the sale of said property; and that decree contains provisions requiring the purchasers at the sale, or their assigns, to pay, among other things, all indebtedness incurred by the receiver or by the railroad company prior to the receivership, upon the court adjudging the same to be superior to the lien of the mortgage. Permission was given to holders of claims for such indebtedness to file, upon fifteen days' notice to the purchasers, petitions to have their claims enforced against the property. No form or method of notice was prescribed. It was further provided that—

> Any such claim for indebtedness, obligations or liabilities which shall not have been presented in writing to the receiver or filed with the clerk of this court prior to the time of delivery of possession of such property, shall be presented for allowance and filed within six months after the first publication by the receiver of a notice to the holders of such claims to present the same for allowance.
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> Printed Record, pp. 39–40.

As will be seen hereafter, the claim of the Territory for taxes herein sought to be recovered, was filed with the clerk of the court before the delivery of possession of the property, and was again presented to the court within six months

after the first publication of said notice by the clerk, who was, at request of the assign of the purchasers, substituted for the receiver as to the publication of the notice.

The property was sold under the decree on May 3, 1897; and on May 4, 1897, the sale was confirmed, the order of confirmation containing like provisions as to payment of debts by the purchasers or their assigns, with a new clause that these should include—

> "also any taxes which may finally be adjudged to be a lien upon the property sold under the decree aforesaid."

These words were inserted at the instance of the counsel for the Territory, in the presence and hearing of the purchasers.

Printed Record, pp. 284 and 125–6.

Both the decree and the order of confirmation contained provisions retaining jurisdiction over the property for the purpose of enforcing claims against it, even to the extent of retaking and reselling it if necessary, and each also stated that claims not filed within six months after publication of the notice, would not be enforceable against the receiver, property, purchasers or their assigns. This was the only provision for finally cutting off claims against the property.

On June 2, 1897, the master made a deed to the purchasers, which was filed for record June 12, 1897, and the property was delivered by the receiver to the Santa Fe Pacific Railroad Company, the assign of the purchasers, on July 1, 1897. The receiver was not discharged until October, 1898.

On June 10, 1897, before any public knowledge that the deed had been made and long "prior to the time of delivery" of the property, the Territory filed with the clerk of the district court, its intervening petition which is the beginning of this proceeding, asking primarily that the taxes be declared a lien on the property, and secondarily

that the receiver, in whose hands was the property, should be ordered to pay the taxes, with interest, to the collector of taxes for Valencia County. The taxes claimed were on the improvements on the right of way of the Atlantic and Pacific Railroad Company where the same runs over what was public domain when the right of way was granted to said company, thirty-three miles in length, valued at $6,500 per mile, making $214,500; on like improvements on the said right of way where it runs over land which was held im private ownership at the time of the grant to the railroad company, 60.7 miles, at same value per mile, making $394,550; and on improvements at eight stations valued at different amounts for different years.

The petition set out that this property had been omitted from assessment for a series of years from 1892 to 1896, and that the collector had, after the tax list for 1896 was delivered to him, listed, valued and assessed the property and entered such assessment on said tax list. The valuation, the rate of tax levied, and amount of taxes, for each year, were severally set out.

On the 23d of June, 1897, the United States Trust Company, complainant in the foreclosure case, and the receiver in whose custody the property then was, filed their verified pleas, which, with accompanying exhibits, cover pages 58 to 103, both inclusive, of the Printed Record.

From this great mass of words we may extract the admission, made carefully, and repeated five different times:

> That about fifty-eight miles of said right of way in said county and Territory was and is through land which was not government land, but which belonged to private individuals or corporations, and was acquired by the railroad company under and through the right conferred upon it by said act of Congress.

This truthful admission appellants have struggled hard to get away from, but without success. Their attempt to do so will be found set out in the affidavit of their learned counsel, in the Record, at pages 110 to 112. On page 112

he says that he made the admission "simply for the purpose of raising the legal questions to be presented by the pleas," and not as an admission of fact. The ingenuity of man can not find in the pleas any "legal question" to the raising of which this admission was necessary.

The pleas also set up objections to the assessments, and the pendency of another intervening petition, in another case, by another petitioner, the collector of Valencia County, asking for taxes of 1892 and 1893, on the basis of earlier, defective and invalid assessments.

The district court dismissed the intervening petition without passing on the pleas. The case reached this court and was here argued in 1898. This court did pass upon the objections to the validity of the assessments, favorably to the Territory, held that the right of way over the land admitted not to have been public domain, was subject to taxation, and remanded the case for further proceedings in accordance with its opinion.

While the case was pending here, the clerk of the district court, pursuant to an order, made on the application of the Santa Fe Pacific Railroad Company, the assign of the purchasers at the foreclosure sale, published the notice to creditors provided for in the decree and order of confirmation, beginning April 3, 1899, and requiring claims to be filed with him as clerk on or before October 23, 1897.

Printed Record, pp. 104–5 and 296.

In August, 1899, the mandate in this case was filed in the district court and the former judgment was vacated and set aside. Further proceedings were had, resulting in a final decree on October 5, 1899.

After the case reached the district court the defendants were permitted to file motions to dismiss while the original pleas in bar were still pending and undisposed of; were then given leave to withdraw those pleas and file a plea in abatement; were then permitted to file a demurrer and afterward pleas in bar; all of which were denied, overruled

or held insufficient. Finally the defendants filed an answer to the petition and the case was submitted to the court upon the petition, answer, an agreed statement of facts, and the files and records of the case.

The district court found in favor of the Territory, but not to the full extent of its claims. It disallowed amounts claimed under certain levies for the payment of judgments against Valencia County; refused to allow the statutory penalty for failure to make returns of property for purposes of taxation; refused to allow the statutory interest of 25 per centum on delinquent taxes; but did allow 6 per centum interest. Both sides appealed to the supreme court of the Territory, and that court restored the amounts claimed under the judgment levies, but struck out all allowance for interest, affirming the district court in other respects.

Both sides have appealed to this court.

In an Appendix to their Brief appellants print certain New Mexican statutes in such way as to be confusing. Some sections are credited to compiled laws of 1884 and others to compiled laws of 1897; but all of these, except sections 345 and 343, on page 165, are really parts of one act, passed in 1882, and all appear in both compilations of 1884 and of 1897.

PRELIMINARY.

It is difficult in the very limited time at my disposal before this case will be reached for hearing, fully to examine, and impossible in detail to answer, the voluminous printed argument submitted on behalf of appellant. It may be well, however, to make some attempt here to condense the contentions of appellants, that we may, if possible, see clearly what they present for consideration. The following is submitted as a *resume* of their points, with references to pages of their brief:

1. The proceeding is one against the receiver only, and upon his discharge in October, 1898, the court lost jurisdiction if it ever had any (*pages 47 to 55*).

2. The court never had jurisdiction, because the Territory did not present its claims to the purchasers, nor give them fifteen days' notice of intention to file petition (*pages 56 to 68*).

3. The taxes never had any existence until June 7, 1897, which was after the sale of the property, and would not be due until more than six months later (*pages 69 to 71*).

4. The plea in abatement must be taken as absolutely true (*pages 73 to 74*).

5. The additional assessments are defective, because they do not sufficiently describe the property assessed, and the intervening petition fails to allege that the collector extended the taxes on the tax rolls (*pages 75 to 82*).

6. The collector had no authority to make the additional assessments because the property had already been assessed by the assessor, no matter how defective the previous assessment may be, or even if it be void (*pages 85 to 91*).

7. Improvements on real estate can not be assessed separately from the land to which they are attached.

8. The collector could not lawfully make additional assessments of property omitted from the tax rolls at any time between the first of March, 1897, and the time when he received the new tax rolls on September 6, 1897 (*pages 94 to 97*).

9. The additional assessments are void because no notice thereof was given to the purchasers (*pages 97 to 99*).

10. The taxes did not exist until after the property was sold and delivered (*page 100*).

11. Land within Spanish grants, in part confirmed by Congress prior to 1866, and the remainder confirmed by the court of private land claims and this court, as perfect titles, must be, for the benefit of this case, treated as public domain, because the grants had not been surveyed before the railroad company had located its line (*pages 103 to 154*).

The Territory contends that of the foregoing enumerated points, the first, ninth and tenth are based upon misconceptions of both fact and law, and that the others are all unsound as matter of law, and the most of them trivial and unimportant. It may be well said, that none of them, except the eleventh, make any substantial attack upon the correctness of the decree of the court below, and that the eleventh sets up a proposition which can find no support either in reason or precedent.

The third and tenth propositions are identical. The seventh was presented to this court on the former appeal of this case, and quite fully argued, but as it appears to have had no effect on the decision of the court, I shall take up no time in discussing it.

No attack is made on the fairness of the valuation of the property, nor upon the regularity of the tax levies by the county and territorial authorities.

All that there is worthy attention in the propositions of appellants, will be considered hereinafter, although, perhaps, not in terms directly responsive to the language used in appellants' Brief.

POINTS AND AUTHORITIES.

FIRST.

The Appellants Have so Made up their Record as to Preclude any Review of the Case in this Court.

When appeals were taken from the decree of the supreme court of New Mexico, the Territory applied to the court to make a statement of facts for use, instead of the evidence at large, on said appeals, in accordance with the requirements of the act of Congress of April 7, 1874, concerning appeals from territorial courts, which has been the subject of frequent consideration in this court. This ap-

plication was resisted by the other side on the ground that the case in the district court was tried on an agreed statement of facts, and therefore it was improper for the supreme court of the Territory to make or certify any other statement of facts. The result of these opposing views will be found in the Record at page 316, where it appears that—

> "the court being willing and desirous that the respective parties be allowed to get their appeals before the Supreme Court of the United States in such shape as their counsel deem proper,"

certified the statement of facts used in the district court for use upon the appeal of the Trust Company and the receiver, and made and certified specific and definite findings of fact, "in the nature of a special verdict," for use on the appeal of the Territory.

The Territory then contended, and still insists, that the agreed statement of facts sets out "the evidence at large", and that an "appeal would be unavailing unless the statement for which it . . . asked be made." The appellants in the present case took a different position, were given what they asked, and are bound by their choice.

Is the agreed statement of facts in this case, such that the court of New Mexico was absolved from the duty of making a statement of facts in the nature of a special verdict for use on this appeal? Examination of the record will disclose that the "agreed statement of facts" is principally a statement of evidence and not of facts. It begins on page 212 of the Printed Record and ends on page 288. It sets out as facts that commissioners of the General Land Office wrote letters which are copied in full, that petitions for the confirmation of grants were filed in the court of private land claims, that other papers relative to grants were also filed in that court, that decrees and opinions were made and rendered by that court, that petitions as to grants were filed in the office of the surveyor general, that testimony was taken before that officer and

that he wrote various opinions, reports and letters about grants, all of which things are set out *in haec verba*, the same as though they had been offered in evidence, without any statement of what they proved. It contains various orders of the commissioners of Valencia County set out in terms, as to the levy of taxes. It contains the testimony of eight different witnesses without any statement that their testimony is true, or of what facts it establishes. Is this something "in the nature of a special verdict?"

If so, then the door is opened for the evasion of the requirements on this point, of the act of Congress of 1874.

SECOND.

The Purchasers at the Foreclosure had Ample Notice of the Claim of the Territory.

A great deal is said in many different places in the "Brief." of appellants as to the failure to give the purchasers notice in accordance with the foreclosure decree, and to make them parties to this proceeding.

So much of the decree as appellants rely on will be found at pages 41–2 of their "Brief." It will be seen that no form of notice or method of giving it is prescribed. Now, by reference to the affidavit of F. W. Clancy, at pages 125–6 of the Record, which is uncontradicted, it will be seen that at the time of the confirmation of the sale (which was on the 4th of May, 1897), the purchasers were fully informed of these claims, of the claim of exemption, and of the purpose to attempt to collect the taxes. This was more than thirty days before the proceeding was begun. The notice was undoubtedly full and complete, as there was "a long discussion."

Under these circumstances, to make a demand on the purchasers and obtain their refusal would have been a

useless formality when every one knew what the result was to be.

As to the suggestion that the purchasers should have been made parties to this proceeding, and the frequent urgings that this is not due process of law, that the owners do not have their day in court, etc., etc., let it suffice to say that this is a proceeding *in rem*, begun while the *res* was in the custody of the court; that any one receiving it from the court took it *cum onere*; that the foreclosure decree does not require that they should be made parties—something the intervenor had no power to do—but merely gives them "the right to appear and make defense."

Have not they, or their assignee, the Santa Fe Pacific Railroad Company, had ample opportunity to appear and make defense? It is shown that "shortly after" the foreclosure sale (which took place May 3, 1897), C. N. Sterry was employed by the purchasers in any pending or future litigation against the receiver (Rec., p. 287); that service of the intervening petition was made at his office in Albuquerque, June 10, 1897, and a letter on the subject written to him the same day, addressed to Los Angeles (Rec., p. 119); that on the 23d of June, 1897, he filed pleas to the intervening petition (Rec., p. 57); that ever since July 1, 1897, he has been the solicitor of the Santa Fe Railroad Company, and in charge of all legal business of that company in New Mexico (Rec., p. 287); and the whole Record shows that he has had charge of the defense of this case from its beginning. They have certainly not been deprived of "the right to appear and make defense."

Moreover, the Santa Fe Pacific Company has made itself a party to the main suit, and is even technically chargeable with a knowledge of these proceedings since December 19, 1898 (Rec., pp. 104, 296).

The purchasers at the foreclosure sale never had possession of the property. When the intervening petition was filed June 10, 1897, the property was still in the custody of

the court by its receiver, who delivered it to the Santa Fe Pacific Company July 1, 1897. The receiver was discharged in October, 1898 (Rec., p. 104). Thereafter, if the company desired to dispute this claim, it had "the right to appear and make defense" to any claim pending against the property at the time of the discharge of the receiver.

In addition to this, on the application of the Santa Fe Pacific Company, a notice to creditors was published, requiring them on or before the 23d of October, 1899, to file their claims with the clerk of the court (Rec., pp. 104–5, 296). They were not required to present them to the purchasers or their assignee, but it was the manifest duty of that assignee to take notice of any such claims. If it could be said that no previous notice had been given, the company certainly after this notice was published by the clerk had its opportunity to appear and defend if it desired to do so. Within the time limited, the mandate of this court was filed with the clerk and judgment thereon entered, and this case reached a final decree before the time expired, the defense being conducted by the general solicitor of the company. It can not be truthfully said that it has been deprived of any constitutional right, especially in view of the provisions of the latter part of paragraph 19 of the foreclosure decree (Rec., pp. 40–1), which are omitted from the quotation in appellants' "Brief" at pp. 41–2 thereof. There was a substantial compliance with the requirements of the clerk's notice to creditors.

THIRD.

This Proceeding was Properly Begun by Notice to the Trustee and Receiver as Ordered by the Court.

Appellants contend that, in some way, the petitioner should have made the purchasers at the foreclosure sale,

parties to this proceeding. In the first place, an intervenor has no such power, and the court, in the discretion of which all such proceedings rest, evidently did not consider such action necessary. This was because the court still held the property. It is true that a sale had been made and confirmed, and a conditional order for a deed and delivery of possession had been entered on May 4, 1897. It now appears from the affidavit of C. N. Sterry, "that as of the date of the 2d day of June, 1897," the deed was executed and delivered (Rec., p. 115); but it also appears from another affidavit that the deed was not filed for record until June 12, 1897 (Rec., p. 119).

The receiver surrendered possession July 1, 1897. This petition was filed June 10, 1897, at which time the court still held the property, and there was nothing to apprise any one that the sale had been completed.

The authorities cited by appellants to show that an action can not be maintained against a receiver after his discharge, are not applicable to the present case. In the first place they relate to independent actions brought against receivers in courts other than those which appointed the receivers; and, second, this court by its foreclosure decree and order confirming the sale, as it had perfect authority to do, prescribed its own course of procedure with regard to claims for which the property might be liable, and clearly contemplated the bringing of such proceedings as the present, in the defense of which the purchasers or their assigns shall have the right to appear if they choose (Rec., pp. 39 to 41, 47–8).

The assertion by appellants that the property had passed into the ownership of third parties, strangers to the suit, before the proceedings were begun, is not quite borne out by the facts. It is true that the deed to the purchasers was made, in the words of Mr. Sterry, "as of the date of the 2d day of June, 1897," (Rec., p. 115), but this deed was not filed for record until after this proceeding had been begun,

and the change of ownership was not completed until July 1, 1897, when the property was delivered to the assignee of the purchasers by the receiver.

FOURTH.

The Description in the Additional Assessment is Sufficient.

Appellants claim that their demurrer should have been sustained on the ground that the description of the property was insufficient because it was not as complete as the description required by section 4032 from the owners of real estate when they make returns. No such particularity of description is required of the assessor when he lists property which has not been returned. The reason for this is obvious. The owner is presumed to know all about his land while the assessor may find it impracticable to ascertain details. And yet appellants at pages 77–8 of their "Brief" would have this court import bodily into sections 4055 and 4056, language which the legislature has not seen fit to put there, and which is found only in another section relating to a different matter. It is not unjust to say that this is a fair sample of the kind of argument by which it is sought to persuade this court that this property should be allowed to escape taxation. The court below certainly took the view that the location and exact description of the 60.7 miles of road sought to be taxed, were matters peculiarly within the knowledge of the other side, especially as there was already in the Record, a five-times repeated and verified admission that there were 58 miles of such road which this court had said was subject to taxation.

That the court was right is evidenced by the fact that the proofs show just where and how much there are of these

miles subject to taxation, and they are set out in the decree, and the appellants furnish a map showing the facts (Rec., p. 277).

Moreover, this court has passed on these assessments, and did so at the earnest solicitation of the other side. There can be no impropriety in calling attention to the fact that in their brief upon petition for rehearing, filed in this court April 3, 1899, the present appellants set out the following proposition:

> If we should admit (that which we most emphatically deny) that the fifty-eight or sixty miles of "right of way" of the Atlantic and Pacific Railroad in Valencia County which was located over lands other than public lands is not embraced within the exemption contained in the second section of the act, such admission would not give any right to this court to reverse the judgment of the Territorial Supreme and District Courts, because in such case, while there might have been an assessment of this fifty-eight or sixty miles of "right of way," and taxes levied thereon, there never was such an assessment or any claim for any taxes based upon any such assessment made by the allegations of the intervening petition, and therefore no issue of that character has ever been presented to this court or to either of the lower courts.

The learned gentleman who conducts this case for appellants, has questioned the validity of these assessments in the highest appellate court in opposition to the mistaken view of counsel for the Territory who in his brief said that "any question as to the irregularity or correctness of the assessment is not before the court at this time." He has been heard, and the decision is against him.

The sections of the statutes referred to, are as follows:

> 4032. The assessor is required, between the first day in March and the first day in May, of each year, to ascertain the names of all taxable inhabitants, and all property in his county subject to taxation.

To this end he shall visit each precinct in the county, and exact from each person a statement in writing or list, showing separately:

First. All property belonging to, claimed by, or in the possession or under the control or management of such person, or any firm of which such person is a member, or any corporation of which such person is president, secretary, or cashier, or managing agent.

Second. The county in which such property is situated, or in which it is liable to taxation.

Third. A description by legal subdivisions, or otherwise, sufficient to identify it, of all real estate of such person and a detailed statement of his personal property, including average value of merchandise for the year ending March 1st; amount of capital employed in manufactures; number of carriages and vehicles of every description; jewelery, gold and silver plate; musical instruments; household furniture; moneys and credits; shares of stock of any corporation or company; and all other property not herein enumerated, with the value of the different classes of property in detail.

4055. If by any means any property shall be omitted in the assessment of any year or series of years, and not put upon the assessor's book, the same when discovered shall be listed by the assessor and placed upon his roll before the same is returned to the board of county commissioners, with all arrearages of taxes, which should have been assessed and paid in former years, charged thereon, or in case of failure of the assessor, the same shall be assessed by the collector in the manner provided in the next section.

4056. When the collector of any county, after the tax list has been delivered to him, ascertains that any real estate, or any personal property then in his county, are omitted from the tax list, and has reason to believe that such personal property has not been taxed in any other county for that year, he shall forthwith proceed to list, value, and assess such property in the same manner that the assessor might have done, and shall enter such assessment in his tax list, following the entries made by the clerk, and such entries shall

be designated as Additional Assessments, and the taxes so assessed by the collector shall be as valid for all purposes as if the assessment had been regularly made in the manner hereinbefore provided. But the person so assessed shall have the right of appeal to the board of county commissioners for a correction or abatement of such assessment, or refunding any part of the tax erroneously assessed, if paid by him.

FIFTH.

There was no Error in Refusing to Sustain the Ground of Demurrer Setting up that the Intervening Petition did not Show that the Collector Assessed Taxes on the Assessments.

The argument of appellants shows that what is meant is that the petition did not allege that the collector extended the taxes on the tax roll in his hands.

The court below may well have put its ruling on either or all of three grounds:

First, this ground of demurrer was frivolous and unworthy of serious attention;

Second, such a ground of demurrer came too late, more than two years after the petition was filed;

Third, the matter was one for proof rather than pleading.

As a matter of fact, the proofs showed that the collector did extend the taxes, so that, even if the action of the court on the demurrer were erroneous, the error was not prejudicial, and it is grossly improper to consume the time and attention of this court by urging it here as a ground for reversal.

SIXTH.

The Property Described in the Additional Assessments was Omitted from the Rolls of 1892 to 1896.

Appellants assert that the additional assessments are void because they are of the same property already described on the previous assessment rolls. This is here denied.

This discussion will be limited to so much of the additional assessments as described property which this court says is taxable.

In each one, that property is described as follows:

> "Also the cross ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph line, and other structures erected upon the right of way of the Atlantic and Pacific Railroad Company in said county of Valencia, and constituting 'improvements' upon the land embraced within said right of way where it runs over land which was held in private ownership at the time of the grant of said right of way to said railroad company, 60.7 miles, valued at $6,500 per mile . . . $394,550."

This clearly describes property subject to taxation, and specifies its status and condition. Appellants have admitted 58 miles of it.

In the rolls for 1892 and 1893, that which appellants claim to be a description of the same property is—

> "Total value of right of way, $327,103.00."

I must refuse to occupy much space with this. No one has ever claimed that the "right of way" over what was public domain was subject to taxation; and in the additional assessments no attempt was made to include any part of the right of way. Upon authority it should be held that as to that part of the right of way over what was private prop-

erty at the time of the grant, the railroad company acquired only an easement.

East Alabama R. Co. *vs.* Doe, 114 U. S. 350.
Keeney *vs.* U. P. R. Co., 31 Fed. 128.
Jones *vs.* Van Bochove, 61 N. W. 343.
Robinson *vs.* Railroad Co., 59 Vt. 426.
Blakely *vs.* Railroad Co., 64 N. W. 972–3.
Kellogg *vs.* Malin, 50 Mo. 499.

Properly viewed, this position is consistent with the opinion of this court in 172 U. S. 171. It is to be noted that the court does not overrule or depart from its holding in 114 U. S. 350, as to the character of estate taken by a railroad company under the power of eminent domain, and that case stands as an authoritative precedent on that subject. In 172 U. S. the court in effect held that Congress in granting a right of way for a railroad through the public domain intended to give something more than a mere easement, and no more.

Therefore "right of way" in the assessment roll as to this part of the road, meant only the easement.

It is urged by appellants that this description—"right of way"—might have been amplified under the power given in section 4091 of the Compiled Laws to correct "omissions, errors or defects in form." Is the description of a mere "right of way" instead of the improvements on the land over which the right of way exists, an error in form? Or is it an error of substance?

Section 4091 of the Compiled Laws is as follows:

> Omissions, errors or defects in form in any assessment list or tax roll, when it can be ascertained therefrom what was intended, may be supplied or corrected by the assessor at any time before the return of the assessment roll to the collector or by the collector at any time after the receipt of such roll by him. When any omission, error or defect has been carried into a delinquent tax list, or any

> error appears in any publication, the list or publication may be amended by the collector and republished as amended; but such publication must be made in the same manner as the original publication and for not less than one week.

The suggestion by appellants that the Territory can be estopped by the action of a county collector (see p. 88 of their Brief) is quite as strong as any of the other numerous arguments with which it is sought to obscure the simple merits of this case. It is so violative of the elementary principles of the law of estoppel that it can receive no further attention here.

As to the assessments for the other years, the reasons for making additional assessments are little, if any, less powerful. In 1894 the assessor put on his list, "93.458 miles main track at $6,500. 607,477.00."

It will be seen that this puts all the railroad in one assessment, for the whole line in the county. There is no indication that any of it is of the character which this court has declared is subject to taxation. In the absence of any showing that the road or some part thereof passed over land which was private property when the grant was made—a showing necessary to the maintenance of a claim of a right to tax—the assessment does not describe taxable property, and the taxable portions, if any, have been omitted from the list.

The same reasoning applies to the assessments for 1895 and 1896, which are in the following language:

> Cross ties, rails, fish-plates, spikes, culverts, bridges, depots, turn-tables, side-tracks, buildings and entire superstructure on right of way, 93.7 miles, in Valencia County, at $6,500.00 per mile. $609,050.00.

The additional assessments, as made, furnish within themselves, in their own language, the means of separating

the valid from the invalid portion of the tax claimed. An assessment of property is void, when the valid portion, if any, of the tax can not be separated, but not so where it is separable. This is clearly set forth by this court in two cases—

People *vs.* Railroad Co., 127 U. S. 1.
Santa Clara *vs.* Railroad Co., 118 U. S. 394.

It is urged most curiously by appellants that if the assessment of 93.7 miles of road, as a whole, is to be considered void because it includes two kinds of miles, one over public domain and the other over private property, the first being exempt, the other taxable, then an assessment of 60.7 miles running over private property, is void if it turns out that there are only 55.5 of such miles.

At the first glance there seems to be something in this, but a little examination will show the fallacy. Let us suppose that all the railroad in the county were taxable, and that the assessor put on the list 93.7 miles when there were really only 90 miles in the county. The owner of the road could not escape paying on the 90 miles because he could show that the assessor had put down too many miles on the list.

Just so, the collector, in the present case, listed 60.7 miles of the road running over land held in private ownership when the railroad company acquired its right, all of such road being clearly taxable. He has assessed nothing except taxable property. The proofs show that his estimate is too large and that there are only 55.5 miles of such road. On account of this mistake, certainly the would-be evader of taxes can not be heard to say that the whole assessment is void and he will pay nothing.

As matter of fact, it is interesting to note the real accuracy with which the collector made his figures. The map-making department of the railroad company, with all its resources, has produced a map which will be before the court on the hearing of this case, which shows the mileage through

the grants almost, if not quite, exactly as given by the collector, the reduction of 5.2 miles agreed on, being occasioned by the fact that the Laguna pueblo grant, as confirmed by the land court, is reduced in area below the previous official survey, so as to cut off 5.4 miles of railroad. And yet appellants tell us they can not know how many miles of the road run over these grants.

It is, however, entirely immaterial to the real interests of the would-be evaders of taxes, whether they pay under the original, or under the additional, assessments for 1894, 1895 and 1896. The amount of tax would be exactly the same if it could be held that the original assessments for those years, were sufficient to enable the Territory to collect a tax upon property not described therein, to wit, so much of the line as is held to be subject to taxation. The valuation per mile is the same, and the resulting tax on that portion of the road would, of course, be the same. Under these circumstances, any argument against the validity of the additional assessments for those years, is unworthy of serious consideration. Courts of equity regard substance and not form, and even at law a case will not be reversed where "the result is right although the manner of reaching it may have been wrong."

Decatur Bank *vs.* St. Louis Bank, 21 Wall. 301.
Allis *vs.* Life Insurance Company, 97 U. S. 145.
Gregg *vs.* Moss, 14 Wall. 569.
Cannon *vs.* Pratt, 99 U. S. 623.
Hornbuckle *vs.* Stafford, 111 U. S. 394.

Had the court below held against the Territory as to these assessments, the only result would have been the amendment of the petition so as to put the right to recover on the original assessments; and even should this court now so hold, it would certainly remand the case with directions to permit such amendment. But such a proceeding would be the idlest sort of formality, and should not be resorted to.

SEVENTH.

The Collector had Lawful Authority to Make Additional Assessments in June, 1897.

The appellants argue that while the statute gives the collector power to make on the tax roll additional assessments of omitted property, yet that power ends upon the arrival of the 1st of March, when returns for taxation are to be made, and from that time he is powerless to act until the new roll is delivered to him some time after the 1st of the following August. In other words, if the tax dodger is not discovered until March, he is safe from annoyance on account of his delinquency for five or six or seven months more. There is nothing in the statute which thus limits the authority of the collector. Section 4056 of the Compiled Laws, hereinbefore quoted, clearly contemplates that he shall act whenever he makes the discovery of the omitted property, and there is nothing said about the time; there is no word limiting him to that fraction of the year—often less than half—intervening between the time he receives the tax roll and the first of the following March. The record in this case shows that the tax rolls in 1892 and 1893 were received by the collector in September; in 1894, 1895 and 1896, in October, and in 1897 in September.

The consequences of the artificial and strained construction contended for by the appellants would be so absurd and mischievous—would be so favorable to those who seek to avoid taxation—that no court will adopt it.

EIGHTH.

There was an Opportunity for Appeal from the Additional Assessments.

It is argued by appellants that it was the duty of the collector to notify the parties in interest of his action on the

7th of June, 1897, so that they might take an appeal. This can only be implied from the fact that the statute gives a right of appeal from his action. It does not direct him to give any notice. Under such conditions, the party assessed could undoubtedly take his appeal, within a reasonable time, whenever he learned of the assessment, and actual notice, no matter how or by whom conveyed, will be sufficient. The collector says that he did send notices to the Trust Company and to the receiver (Rec., p. 282); but whether he did or not, they had notice of the collector's action by the intervening petition on June 10, 1897, when it was served (Rec., p. 119), and could then have appealed had they so desired. A meeting of the commissioners for the very purpose of hearing such appeals was by law appointed to be held on the first Monday in July.

But appellants contend that the collector should have notified the purchasers or their assignee, although, at the time he acted, he could not know they were interested parties because the deed to the purchasers, made "as of the date" of June 2, 1892, only five days before he acted, was not placed of record until June 12, 1897, five days after he acted, while the assignee, the Santa Fe Pacific Company did not take the property from the receiver until July 1, 1897, after the intervening petition had been dismissed and an appeal had been taken. It was certainly enough if notice reached the court and its receiver, who had the custody of the property.

The section of the statutes providing for a meeting of the county commissioners to hear appeals from assessments will be found on pages 158–9 of appellants' Brief.

NINTH

The Taxes are Liens on the Property from the Dates of the Levies in the Several Years, Respectively.

Appellants argue that because the property was not assessed until June, 1897, the taxes could not be liens on the property until after that date, and therefore these taxes are not within the terms of the order of confirmation of sale, cannot be a charge upon the property in the hands of the purchasers, and cannot be collected at all.

In other words, if an owner of land by misleading or false returns, or by making no returns at all, succeeds in avoiding taxation for one or more years, and then sells and conveys his property to a third person, no assessment can be made by which the property can be held liable for the back years, and the Territory is remitted to a personal action against the original tax-dodger who may be insolvent or out of existence like the Atlantic and Pacific Company or the receiver Smith. The statement of the proposition shows its absurdity.

Peters *vs.* Myers, 22 Wis. 576-7.

Besides, our statutes clearly show the legislative intent to be different. The evident meaning of section 4056, hereinbefore quoted, which authorizes the collector to make assessments, is to put the taxes on the same footing as though the assessments had been made in the ordinary manner at the proper time. It declares that the taxes—

> "shall be as valid for all purposes as if the assessment had been regularly made in the manner hereinbefore provided."

One of those purposes is, in the words of section 4057, that the "taxes upon real estate are hereby made a lien thereon from the date of the levy thereof." Unless the taxes on

these additional assessments are held liens on the real estate assessed, from the same date as the taxes on property assessed in the ordinary manner, the obvious intent of the legislature, clearly expressed, will be defeated, and these taxes thus due under additional assessments cannot be held liens at all.

The statute provides, in section 4057, that the taxes shall be liens "from the date of the levy thereof." What is the "levy" of the taxes? Aside from the statutory provisions which show what the legislature considers to be the levy, and to which attention will be called a little later, the ordinary use of language indicates that the assessment, or valuing and listing of property, is not the levy of a tax; nor is the extending on the tax roll of the amounts of taxes apportioned to any person or property, the levy of a tax. The levy of a tax means something different. The taxes of 1892 were levied in that year when the county commissioners acted, and none of them could be levied by any one in 1897.

The ordinary meaning of the word shows the above to be correct, but our legislation puts it beyond all chance of doubt. The county commissioners, who do not make the assessments, by section 4049 of the Compiled Laws are to "make an order approving the assessment roll as revised and corrected by the board and levying the taxes for the year." By section 4021 the county commissioners only are "authorized to levy taxes for the current expense purposes" of the county. Section 4179 provides that "there shall be levied" for territorial purposes a tax of seven mills on each dollar of taxable property. Numerous other legislative expressions might be cited to show that the levy of the taxes, and the assessment of property, are entirely distinct things.

The collector can not levy a tax. No word in our statute gives him any such power

And yet appellants would have the court believe that the taxes were levied, if they exist at all, only when the col-

lector acted in June, 1897, and that the lien can not relate back to the date when the county commissioners made the only levy authorized and permitted by law.

The sections of the statutes above referred to are as follows:

4057. Every tax levied according to the provisions of this act shall have the force and effect of a judgment against the person assessed, and taxes upon real estate are hereby made a lien thereon from the date of the levy thereof, and taxes properly and lawfully assessed due from any person upon personal property shall not be satisfied nor the lien removed until the taxes are paid or the property sold for the payment thereof. The tax list and warrants hereinbefore provided for shall have the force and ~~and~~ effect of an execution against the person or property assessed.

4049. The board of county commissioners at their June session, or at any special session subsequent thereto, and prior to the first day of September, shall make an order approving the assessment roll as revised and corrected by the board, and levying the taxes for the year, for territorial, county and school purposes, as provided by law; which order shall be entered of record in their proceedings, and indorsed upon the assessment roll under the seal of said board, and the hand of the clerk thereof.

4021. The county commissioners of the several counties of the Territory are hereby authorized to levy taxes for the current expense purposes for the year 1898 not to exceed four mills on the dollar, and annually thereafter not to exceed three and one-half mills on the dollar, upon the assessed value of all taxable property.

4179. For the territorial purposes of the forty-ninth fiscal year there shall be levied during the forty-eighth fiscal year, upon each dollar of taxable property, the following tax: Seven mills on the dollar.

For the territorial purposes of the fiftieth fiscal year there shall be levied during the forty-ninth

> fiscal year, upon each dollar of taxable property in the Territory, the following tax: Seven mills on the dollar. Provided, That the territorial treasurer shall distribute the cash product of the tax levy of each fiscal year in proportion that each appropriation bears to the total appropriation.

It being clear that the taxes for the several years were liens from the respective dates of the levies in those years, it follows that they are to be treated as having become delinquent at the same time the other taxes for such years became delinquent, and interest must be computed on them from such times in accordance with the terms of the statute. A Minnesota case is urged by appellants against this contention; but an examination of the case will show that the views of the court are in harmony with what the Territory here contends for. The following quotation will show this:

> Had the legislature the right, in the case of the assessment of taxes for past years, to include in and add to these taxes interest from the date when they would have become delinquent if they had been levied in the proper year? We think not. To render a person chargeable with interest there must be a promise, express or implied, to pay it, or some default of duty on his part in not sooner paying the money. Sibley *vs.* County of Pine, 31 Minn. 201 (17 N. W. Rep. 337). In a case like the present there is neither. If the law required a land owner to list his property for taxation, his failure to do so whereby it escaped payment of the tax at the proper time, would constitute such a default of duty as would justify charging him with interest for the time during which the public was deprived of the use of the money. Or if the amount of the tax had been ascertained, so that he had an opportunity to pay it, but instead of doing so saw fit to defeat its present collection by interposing an objection on the ground of some defect or irregularity in the proceedings, and a reassessment thereby became necessary, we can see how it might be urged that he could be charged

with interest during the time that the collection of the tax was postponed, for the tax payer himself would be in a sense responsible for the delay. But where the land has been entirely omitted from the aasessment rolls the owner is not in default. He is not required to list his land. The neglect or omission is wholly that of the public officer. He has never had an opportunity to pay the tax, for the amount of it has never been ascertained. If, under such circumstances, in the absence of any default on his part, the legislature can impose interest retrospectively, there is no reason why it might not also impose certain penalties for the non-payment of the tax, for both stand, in this respect, on the same footing. Both are in the nature of damages for a default of legal duties. The only difference is that one is in its nature compensatory, while the other is punitive. The effect of adding this back interest to the amount of the tax, in the absence of any default on the part of the owner, is to make his taxes that much larger than those of his neighbors on property of the same value. This, in our judgment, would be in violation of the principle of equality of taxation enjoined by the constitution. This provision of the statute we therefore hold invalid.

Redwood *vs.* Land Co., 40 Minn. 522–3.

This case has been affirmed by this court.

It will be seen that the court distinctly approves of the exaction of interest, where there is any default of duty on the part of the land owner. Here there is certainly such default, and there is nothing to be discovered in the history of this litigation which entitles the railroad to any tender consideration. The Territory ought to recover every cent which the statute will permit. While statutes as to taxation must be strictly complied with to fix burdens on the property of the citizen, yet no liberal construction of such statutes can properly be made in order to favor the owner of property who is in default, and seeks by every possible device to evade his just share of taxation.

TENTH.

Congress Never Granted any Right of Way Through the Spanish Grants Mentioned in the Record and Decree.

Fifty-two pages of appellants' "Brief" are occupied with an attempt to convince the court that these grants must be, for the purposes of this case, treated as having been public domain. No attempt will here be made to follow the details of the argument of appellants. A brief, plain statement of the facts will be sufficient

Of these grants, some had been confirmed by Congress prior to the date of the act creating the Atlantic and Pacific Railroad Company in 1866. All of the others have been confirmed by the court of private land claims as titles which were complete and perfect at the time of the cession of the country to the United States in 1848, and all of the decisions have become final. At the time of the hearing of this case in the district court, appeals were pending in this court from the confirmations by the court of private land claims, of two of these grants (Rec., p. 227), but since that time this court has affirmed the decrees.

By the act of 1866, Congress did not grant a right of way through any specific land, but only through the public domain. That grant gave certainly nothing through the lands already confirmed by Congress, thus declared not to be parts of the public domain. Whatever may have been the previous title, whether perfect, imperfect or worthless, Congress made a good title from the date of its action.

By the confirmation of all the others as perfect titles, in the court created for the purpose, our government has authoritatively declared that it never had any title to the land embraced within them. In other words, that land has always been private property since we acquired the country in 1848.

Appellants attempt to argue that the grant of the right of way to the railroad company over the public domain by the second section of the act of Congress of 1866, gave the company a right of way not only over the public domain but through the various private land grants in Valencia County, and although the court of private land claims may have held those titles to be perfect, yet the railroad company is protected in its absolute property by the provisions of the fourteenth section of the act of Congress creating the court of private land claims, by which it is provided that if any lands decreed to any claimant shall have been sold or granted by the United States to any other person, such title to such other person shall remain valid. The answer to this is so obvious, that it is not easy to understand why the proposition should be seriously set up. An examination of the act of 1866 will disclose the fact that Congress did not undertake to grant any land, except that which was the property of the United States, and as to any other land, it merely gave the company the right of eminent domain by the seventh section of the act. The United States has now, through the tribunal created for that purpose, declared that at no time after 1848, had it any title to any of the land embraced within these grants which have been confirmed by the court of private land claims. Therefore, the grant of a right of way through the public domain in 1866, gave nothing through the lands which the government has never owned.

Attention is called more than once, by appellants, to the fact that the railroad company acquired no land in the grants by purchase or condemnation; but the fact of acquisition of title to such land by adverse possession under the seventh section of the act of 1866 is carefully ignored. There is no doubt that the only title the railroad company can have to its right of way through these grants, is by possession for more than six years, which bars all claim by the owners.

It is, to say the least, interesting to note that appellants at page 119 of their Brief have the courage in this court to assert that two grants are imperfect, notwithstanding the decision of this court that the titles to those particular grants were perfect.

United States *vs.* Chaves.

Their assertions that the other grants are imperfect, in the face of the decrees of the court of private land claims, are equally interesting and convincing.

A number of questions raised by the assignment of errors, some of which were argued in the court below, are not touched upon in appellants' Brief, and have been, presumably, abandoned. They are, therefore, left unnoticed in the present brief.

Before closing, however, attention should be briefly called to appellants' suggestion that their plea in abatement must be taken as absolutely true, because passed upon by the district court without the taking of proofs. It will be seen that the plea in abatement raises the same questions as had been previously raised by the motion to dismiss, as to which affidavits and counter-affidavits were filed. In the district court, as here (Appellants' Brief, pp. 73–4), counsel stated that the plea in abatement was filed to present in different form the questions raised by the motion to dismiss, and was filed only "out of an abundance of caution." The district court merely followed its previous ruling on the motion as to which it was informed by the affidavits, but, now, on appeal, we are told that we must not look at those affidavits in considering the plea in abatement, but are forced by a technical rule of procedure to take the plea as absolutely

true. This would sacrifice substance to shadow. Discussion seems unnecessary.

It is respectfully submitted that there is no merit in appellants' appeal and that the judgment of the court below would necessarily be affirmed were it not for the cross appeal, which may necessitate changes in that judgment in favor of the Territory.

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